No. 13889.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PREFERRED INSURANCE COMPANY, a Corporation; MICHIGAN SURETY COMPANY, a Corporation; MID-STATES INSURANCE COMPANY, a Corporation; and THE MERCANTILE INSURANCE COMPANY OF AMERICA, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' SUPPLEMENTAL BRIEF.

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Appellants desire to call the Court's attention to the following cases decided since filing its Brief herein, and to reply to the Government's Supplemental Brief.

1. *United States v. Peter Brown*[1] (U. S. Supreme Court, decided 12/6/54, and reproduced in full in the Appendix hereto). In its Briefs (Govt. Br. pp. 10-15;

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[1]The Court of Appeals decision in this case was cited in Appellants' Reply Brief, footnote 5, page 10.

Supp. Br. p. 2), the Government took the position that the *"ratio decidendi"* of the *Feres* case was that the existence of a statutory compensation system precluded a soldier from suing under the Federal Tort Claims Act for service-incident personal injuries, such compensation system being the exclusive remedy for such injuries. From this premise, the Government concluded (p. 15) that the Military Personnel Claims Act must likewise be deemed to be the exclusive remedy for service-incident property damage claims.

In the *Brown* case, the Supreme Court declares that *Feres* did not so hold. To the contrary, that Court reaffirms its previous holding in *Brooks v. United States* that the compensation acts do not provide that they are and they were not intended as the exclusive remedy for injured service personnel.

In the *Brown* case, the Supreme Court states that the basis of *Feres* was "the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty" and because the Tort Claims Act was not intended " 'to visit the Government with novel and unprecedented liabilities.' "

It is submitted that the *Brown* case strengthens the contention of appellants (Appellants' Br. pp. 41-42, 48-51), that nothing in *Feres* requires a holding that suit may not be brought under the Tort Claims Act for service-incident property damage claims. As pointed out in *Feres* (see Appellants' Br. p. 42), the general claim statutes (including the Military Claims Act of 1943) have always excluded service-incident personal injury claims. On the other hand, for over 40 years the general claim statutes

were construed as including service-incident property damage claims. And such recognition was expressly provided for in Section 4 of the 1945 Military Personnel Claims Act, which specifically made the 1943 Military Claims Act applicable to service-incident property damage claims. And, in turn, the Tort Claims Act repealed (*pro tanto*), and took jurisdiction of negligence claims covered by, the Military Claims Act.

The Supreme Court was not legislating in *Feres,* but merely construing the Tort Claims Act in light of a long history with respect to service-incident personal injury claims. Since an entirely contrary history exists with respect to service-incident property damage claims, and Congress has for many years evidenced a clear intent to accord soldiers the same claim rights with respect to service-incident property damage claims as are accorded civilians, and such rights have been accorded for many years and can continue to be accorded without disrupting military discipline, *Feres* is not applicable. *Feres* was at pains to point out that the decision there reached was not unfair to soldiers, as the compensation system provided generous, uniform and certain benefits. But here, the Government is urging the application of *Feres* in order to sharply curtail claim rights of all Defense Department personnel. If *Feres* is applied to negligently caused service-incident property damage claims, there will be many such claims for which service personnel will be without any remedy. Such result should not be reached in the absence of a compelling reason therefor.

2. *Snyder v. United States* (U. S. D. C., Dist. Md.), 118 Fed. Supp. 585. Plaintiff husband was a Sergeant in the Air Force stationed at Bowling Air Force Base. He

and his wife (also a plaintiff) lived in a house near the Base. At a time when Sergeant Snyder was home on a liberty pass (not a furlough), a plane from the Base crashed into their house and injured the plaintiffs and damaged their household furniture and personal effects. They brought suit under the Federal Tort Claims Act to recover for personal injuries and property damage. The Government contended that the claim for property damage was not covered by the Federal Tort Claims Act and was compensable exclusively under the Military Personnel Claims Act. Chief Judge Coleman rejected this contention because (p. 588 of 118 Fed. Supp.):

> "* * * that Act is not by its express terms applicable to the present case, since the house which was destroyed, together with personal property was not quarters 'assigned' to (Sergeant Snyder) incident to his military service. See Fidelity-Phenix Fire Ins. Co. v. U. S., 111 F. Supp. 899."

In other words, the Court ruled that property damage claims that were excluded from coverage under the Military Personnel Claims Act were covered by the Federal Tort Claims Act (see discussion of this precise point in Appellants' Br. pp. 43-52). The Government appealed from the *Snyder* judgment to the Court of Appeals for the Fourth Circuit.[2] An examination of the Government's Brief on said appeal discloses that the Government urged no error with respect to the above-mentioned construction of the Military Personnel Claims Act, the sole point urged on appeal being alleged excessive damages.

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[2]We are advised the appeal was argued 11/18/54 and has not yet been decided.

3. *Barnes v. United States* (U. S. D. C., W. D., Ky.), 103 Fed. Supp. 51.[3] A soldier, on pass (not furlough), while driving his automobile (not on the post) was negligently struck by a government vehicle. The Court rendered judgment under the Federal Tort Claims Act in favor of the soldier for both personal injury and property damage, including his auto and other personal property. We are advised that the Government took no appeal from this judgment.

4. *Zoula v. United States* (cited in Government's Supplemental Brief). The following comments appear to be pertinent with respect to this case.

(a) Throughout the opinion, the Court minimizes the holding in the *Brooks* case, and, in effect, states that the Supreme Court and other Federal courts have since disapproved of much of the language and reasoning of *Brooks*. In view of the decision of the Supreme Court in *United States v. Peter Brown (supra),* in which the holding and reasoning of *Brooks* is reaffirmed, it would seem that the weight that might otherwise be given to the *Zoula* opinion is considerably diminished.

(b) *Zoula* holds that an injury sustained by a soldier while on pass, since he is technically still *on duty,* is incident to service. While this conclusion appears questionable (see *Snyder* and *Barnes* cases, *supra,* and *Brown* and *Samson* cases, cited p. 56, Appellants' Br.), such holding necessarily distinguishes *Zoula* from the instant case. Here the stipulation provides that the soldiers were "off duty," which would be exactly opposite to *Zoula's*

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[3]This case was decided prior to the filing of appellants' briefs but was inadvertently omitted therefrom.

construction of the status of a soldier on pass. For example, in *United States v. Peter Brown,* the dissent refers to the soldier in *Brooks* as being "off duty," when his status was actually on furlough, thus indicating the identity of the two.

(c) As to the personal property issue, *Zoula* merely cites the opinion of the District Court herein and concludes without any discussion or reasoning that the Military Personnel Claims Act is the exclusive remedy for service-incident property damage claims. It is submitted that in the absence of an indication that the Court considered[4] the important questions of statutory history and the administrative and congressional interpretation and construction of the pertinent claims statutes, the *Zoula* opinion can hardly be considered an authoritative answer to the problems presented on this appeal.

(d) *Zoula* involved alleged service-incident damage to an automobile belonging to a soldier, and in reaching its conclusion, the court appears to rely entirely on the citation of the decision of the District Court herein. This confirms our contention (Appellants' Br. p. 47), con-

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[4]We have examined the Appellants' and Government's Briefs in *Zoula.* As to the property damage issue the appellants devote only a page and a half which is restricted to the citation of and quotation from *Lund v. United States* (See Appellants' Br. herein, p. 57). The Government's Brief (filed several months after its brief was filed herein, and apparently prepared by the same lawyers who prepared its Brief herein) makes practically the same arguments as in the instant appeal. It entirely omits any reference to the statutory history and provisions of the various general claim statutes, or the administrative and congressional interpretation that they included service-incident property damages claims (See Appellants' Br. herein, pp. 11-43). And in reproducing what it claims to be the "pertinent part" of the Military Personnel Claims Act of 1945, it omits Section 4 thereof (which reinstated service-incident property damage claim rights under the Military Claims Act of 1943).

curred in by the Government (see Appellants' Rep. Br. p. 1), that the holding of the District Court herein is applicable to and greatly restricts the claim rights of all military and civilian personnel of the Defense Department. However, *Zoula* goes one step further than the District Judge desired to go herein, and applies the ruling of the District Court, without any discussion whatsoever, to a claim for damage to a motor vehicle, which claim is excluded from coverage under the Military Personnel Claims Act [Tr. 36]. The District Court herein attempted to leave this question undecided by his Opinion [Tr. 36]; but it would appear (based on the decision in *Zoula* and as contended in Appellants' Br. herein pp. 46-48), that the decision of the District Judge is, in fact, tantamount to a holding that *all* service-incident property damage claims are excluded from the Tort Claims Act, even though such claims are excluded from coverage or covered only on a restricted basis under the Military Personnel Claims Act.

Respectfully submitted,

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Attorneys for Appellants.

APPENDIX.

No. 38.—October Term, 1954.

United States of America, Petitioner, v. Peter Brown.

(December 6, 1954.)

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Mr. Justice Douglas delivered the opinion of the Court.

This is a suit under the Federal Tort Claims Act, 28 U. S. C. §1346(b), brought by respondent, a discharged veteran, for damages for negligence in the treatment of his left knee in a Veterans Administration hospital. The injury to the knee occurred while respondent was on active duty in the Armed Services. The injury led to his honorable discharge in 1944. In 1950, the Veterans Administration performed an operation on the knee; but the knee continued to dislocate frequently. So another operation was performed by the Veterans Administration in 1951. It was during the latter operation that an allegedly defective tourniquet was used, as a result of which the nerves in respondent's leg were seriously and permanently injured.

The Veterans Act, 48 Stat. 526, 38 U. S. C. §501a, allows compensation both where the veteran suffers injury during hospitalization and where an existing injury is aggravated during the treatment. Each is considered as though it were "service connected." Respondent received a compensation award for his knee injury when he was honorably discharged; and that award was increased after the 1951 operation.

The District Court agreed with the contention of petitioner that respondent's sole relief was under the

Veterans Act and dismissed his complaint under the Tort Claims Act. The Court of Appeals reversed. 209 F. 2d 463. The case is here on a petition for certiorari which we granted because of doubts as to whether Brooks v. United States, 337 U. S. 49, or Feres v. United States, 340 U. S. 135, controlled this case.

The Brooks case held that servicemen were covered by the Tort Claims Act where the injury was not incident to or caused by their military service. (337 U. S. 49, 52.) In that case, servicemen on leave were negligently injured on a public highway by a government employee driving a truck of the United States. The fact that compensation was sought and paid under the Veterans Act* was held not to bar recovery under the Tort Claims Act. We refused to "pronounce a doctrine of election of remedies, when Congress has not done so." *Id.,* 53.

The Feres decision involved three cases, in each of which the injury, for which compensation was sought under the Tort Claims Act, occurred while the serviceman was on active duty and not on furlough; and the negligence alleged in each case was on the part of other members of the armed forces. The Feres decision did not disapprove of the Brooks case. It merely distinguished it, holding that the Tort Claims Act does not cover "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." (340 U. S. 135, 146.) The peculiar and special re-

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*We indicated that recovery under the Tort Claims Act should be reduced by the amounts paid by the United States as disability payments under the Veterans Act. 337 U. S. 52, 53-54. See the case on remand, *United States v. Brooks,* 176 F. 2d 482, 484.

lationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character. (*Id.,* 141-143.)

The present case is, in our view, governed by Brooks not by Feres. The injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status. The damages resulted from a defective tourniquet applied in a veteran's hospital. Respondent was there, of course, because he had been in the service and because he had received an injury in the service. And the causal relation of the injury to the service was sufficient to bring the claim under the Veterans Act. But, unlike the claims in the Feres case, this one is not foreign to the broad pattern of liability which the United States undertook by the Tort Claims Act.

That Act provides that, "the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U. S. C. §2674. The Feres case emphasized how sharp would be the break in tradition if the claims there asserted were allowed against the United States, the Court noting that the effect of the Tort Claims Act is "to waive immunity from recognized causes of action," "not to visit the Government with novel and unprecedented liabilities." 340 U. S. 135, 142. But that cannot be said here. Certainly this claim is one which might be cognizable

under local law, if the defendant were a private party. Responsibility of hospitals to patients for negligence may not be as notorious as the liability of the owners of automobiles. But the doctrine is not novel or without support. See, for example, Sheehan v. North Country Community Hosp., 273 N. Y. 163, and the cases collected, in 25 A. L. R. 2d 29.

Congress could, of course, make the compensation system the exclusive remedy. The Court held in Johansen v. United States, 343 U. S. 427, that Congress had done so in the case of the Federal Employees Compensation Act with the result that a civilian employee could not sue the United States under the Public Vessels Act. We noted in the Brooks case, 337 U. S. 49, 53, that the usual workmen's compensation statute was in this respect different from those governing veterans, that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act. We adhere to that result. We adhere also to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty. Since the negligent act giving rise to the injury in the present case was not incident to the military service, the Brooks case governs and the judgment must be

Affirmed.

Mr. Justice Black, with whom Mr. Justice Reed and Mr. Justice Minton join, dissenting.

In Brooks v. United States, 337 U. S. 49, we held that actions for damages could be brought against the Government for injuries to one soldier and the death of another due to negligent operation of an army truck. But we pointed out that the accident there had nothing to do with the "army careers" of the soldiers and was neither caused by nor incident to their military service. When injured the two soldiers were off duty and were riding along a state highway in their own car on their own business which bore no relationship of any kind to any past, present or future connection with the army. Thus, the two soldiers would have been injured had they never worn a uniform at all. In this case, however, the injury is inseparably related to military service and the Brooks case should not be held controlling. But for his army service this veteran could not have been injured in the veterans hospital as he was eligible and admitted for treatment there solely because of war service which gave him veteran status. Moreover, he was actually being treated for an army service injury.

For a hospital injury a veteran is entitled to precisely the same disability benefits as if the injury had been inflicted while he was a soldier.* We have previously

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*"Where any veteran suffers . . . an injury or an aggravation of any existing injury, as the result of hospitalization or medical or surgical treatment . . . benefits . . . shall be awarded in the same manner as if such disability, aggravation or death were service connected. . . ." 48 Stat. 526, 38 U. S. C. §501a.

held, I think correctly, that a soldier injured in a hospital cannot also sue for damages under the Tort Claims Act. Feres v. United States, 340 U. S. 135. But the Court now holds that a veteran can. To permit a veteran to recover damages from the Government in circumstances under which a soldier on active duty cannot recover seems like an unjustifiable discrimination which the Act does not require.